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Supreme Court of the United States

[redacted]

October Term, 1974

[redacted]

S. J. PERRY, Superintendent,
Marion Correctional Institution,

Petitioner,

v.

OBIE BROOKS,

Respondent.

[redacted]

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[redacted]

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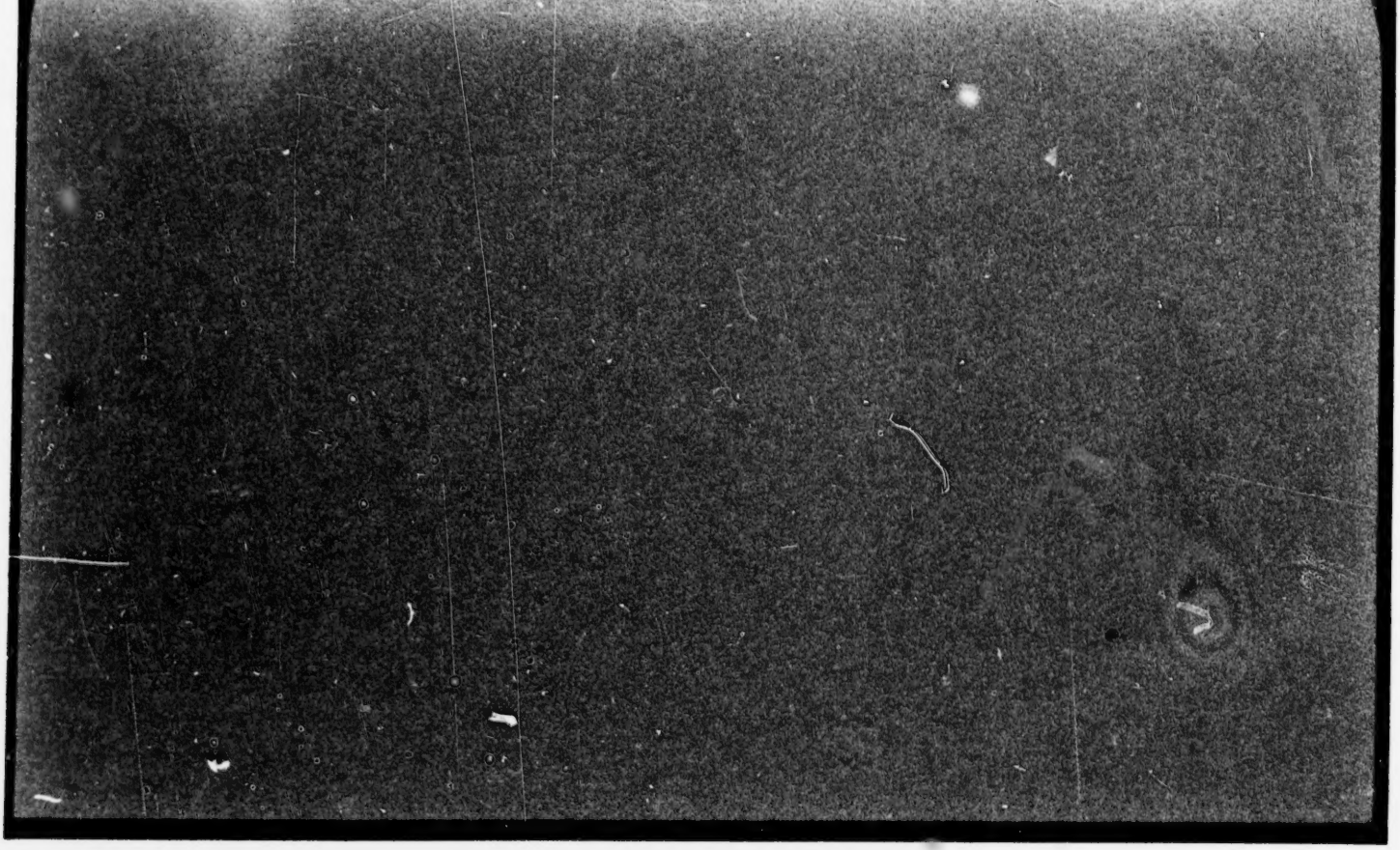


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1. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT WITHOUT WRITTEN OPINION WHEN THE DISTRICT COURT, WITHOUT AN EVIDENTIARY HEARING, HAD REFUSED TO ACCEPT THE FINDINGS OF FACT OF THE STATE COURT WHICH WERE MADE AFTER A FULL HEARING AND FULLY SUPPORTED BY THE RECORD CONTRARY TO THE MANDATE OF THIS COURT IN *LA VALLEE v DELLE ROSE* 410 U.S. 690 (1973).

2. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT WITHOUT WRITTEN OPINION WHEN THE DISTRICT COURT REFUSED TO CONSIDER THE QUESTION OF HARMLESS ERROR THE QUESTION HAVING BEEN

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IN THE

Supreme Court of the United States

October Term, 1974

E. P. PERINI, Superintendent
Marion Correctional Institution,
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v.

OBIE BROOKS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, E. P. Perini, prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the Sixth Circuit entered on June 4, 1974, rehearing denied July 26, 1974, which judgment affirmed the granting of the writ of habeas corpus to respondent by the United States District Court for the Northern District of Ohio, Western Division.

OPINIONS BELOW

The opinion of the United States District Court is attached as Exhibit B. The opinion of the United States Court of Appeals, Sixth Circuit, affirming the district court is attached as Exhibit A.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of §1254(1), Title 28 U.S.C., and pursuant to Rule 19(b) of the Supreme Court Rules. Petitioner believes that the decision of the court of appeals is in conflict with the decisions of this Court, of the decisions of other federal courts of appeals and even with its own decisions in similar cases.

QUESTIONS PRESENTED

1. Should a federal court invalidate the admission into evidence of a taped statement as involuntary when the record sustained the trial court finding, made after a full and fair hearing, that the statement was voluntarily made and was consistent with federal constitutional standards?

2. Should a federal court refuse to consider the question of harmless error when all of the matter contained in the complained of statement was recited to the trial jury in defense counsel's opening statement and was admitted in evidence with a "No objection" comment by defense counsel?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, Obie Brooks, Jr., was indicted together with one Ossie Avon McMillan by the Grand Jury of Summit County, Ohio, for the crime of murder in the first degree. He was arraigned on December 31, 1971 and, while represented by counsel, entered a plea of not guilty. He subsequently waived trial by jury and elected to be tried to a three judge panel.

Thereafter, on April 11, 1972 respondent was tried to the three judge panel, which on April 13, 1972 found him guilty of the lesser included offense of murder in the second degree.

An appeal was perfected in the Summit County Court of Appeals which, after briefs had been filed and oral

argument held, affirmed the judgment of the trial court. An appeal to the Supreme Court of Ohio was, after a hearing before the Master Commissioners, denied.

Prior to trial, defense counsel filed a motion to suppress a taped statement made by respondent to an assistant prosecuting attorney and the police. After a full evidentiary hearing, the trial court found that under the facts presented, respondent had waived his right to counsel after full *Miranda*[1] warnings before he made the complained of statement and that there was no evidence presented to show that the statement otherwise was involuntarily made. The court of appeals concurred in this finding.

Respondent filed a petition for a writ of habeas corpus in The United States District Court for the Northern District of Ohio, Western Division. After petitioner had filed a return of writ and furnished the district court with copies of the trial transcripts which included the *voire dire* hearing in respondent's motion to suppress his taped statement and the opening remarks to the jury of defense counsel and the opinion of the Ohio appellate court, the district court, without evidentiary hearing, on November 29, 1973, issued the provisional writ of habeas corpus with a finding that respondent's taped statement was involuntarily made.[2] The district court refused to consider the question of harmless error.

An appeal to the United States Court of Appeals for

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

[2] "The Court, finding a violation of petitioner's constitutional rights occurred in the state court conviction will issue the writ unless appellant (sic) is retried by the State of Ohio and Summit County within a reasonable time without the introduction of any evidence of the unconstitutionally obtained confession or any evidence obtained therefrom."

the Sixth Circuit resulted in an affirmance of the district court judgment on June 14, 1974. No opinion was written by the court of appeals. A petition for rehearing was denied on July 26, 1974.

It is from the opinion of the district court as affirmed by the court of appeals that petitioner seeks the Writ of Certiorari.

STATEMENT OF FACTS

The statement of facts is, for the most part, taken from defense counsel's opening statement to the jury, therefore, is considered by petitioner to be most favorable to respondent.

On October 29, 1971, Ossie McMillan came to the house of respondent Obie Brooks in Akron, Ohio telling him he wanted to go out and get some money. McMillan said he needed money. They left the house separately. First respondent returned and later McMillan who brought with him a gun. Later they left together and headed east on Market Street; they got into the downtown area in the vicinity of the old Mayflower Hotel. They saw a man who appeared to be intoxicated getting his car. He started to drive north on Main Street. McMillan was driving and followed this car to South Street. (Their purpose in following the man was to rob him.) The driver ended up in a parking lot, left his car and entered a bar. McMillan parked nearby and Brooks got out of the car to look for the driver. Brooks claimed there was an argument in the car prior to this time, and that he was somewhat worried for one reason or another about Avon McMillan, so he took the gun. When he got out, he had the gun in his hand and ran back between

the houses to the far end of the parking lot behind the South Bar all the way to where Clay Drive or Clay Court is. When he got to that alley, he saw nothing. By this time, McMillan had followed and was in the middle of the parking lot. Obie Brooks heard McMillan say, "Do you see anything," or, "Do you see him?". Obie replied, "No, let's go."

Obie Brooks and McMillan started walking back the way they came. As they were leaving the area, a number of people came running out of the South Bar. Believing that Brooks and McMillan were frisking cars, these men started to chase them and as they ran, Brooks and McMillan separated. Defense counsel stated that: "Obie Brooks will testify that he is running and he had the gun in his hands, and he turned and fired--he had the gun under his left arm and he fired down twice. He said he heard a shot—he will say he heard a shot prior to this. Other witnesses will testify that there was more than two shots. Obie will testify that he fired twice." "He will testify that he went around the corner on South Street from Kling and that another man came up to him, and Obie turned, pointed the gun at him, and said, 'Don't follow me,' and the man didn't and Obie went on."

Defense counsel continued:

"The evidence will show that ten days or so later about the ninth or tenth of November, Obie was picked up. As he was leaving his cousin's place, his alleged cousin's place, Lindsay Carter, he was picked up by two officers—Officers Farmer and Peaslee—they took him downtown; and the evidence will show that at one point during his examination he asked for a lawyer and told the police or whoever was taking the statement that he would want a lawyer, but since there wasn't one, it was

okay to go on. The question was asked of him, two more questions after that, do you want a lawyer; and he went on to say no, and he went on to give a statement."

It is obvious that at this point at the outset of the trial, defense counsel was not concerned with respondent's statement. Their prime purpose was to convince the trial court that at the time of the killing, there was no intent on his part to commit robbery.

This is further evidenced by the fact that when the prosecutor offered a transcript of respondent's taped statement into evidence as people's exhibit 4, the following appears:

Prosecutor Lowrey: Move the admission of 1 through 4.

Judge Hunsicker: May be admitted.

Mr. Lynett: No objection.

There is no question that respondent had expressed a wish to have an attorney and that an attempt was made to get one for him as was the practice in the Summit County Prosecutor's Office. On cross-examination at the suppression hearing, respondent presented a relatively clear description of the examination proceedings. It is significant that before any statement was taken, oral or taped, that respondent had been advised that he had a right to have present a court appointed counsel and that he understood that right. That after he had indicated a desire to have counsel, the prosecutor had attempted to get one. That after he had been unsuccessful in his efforts, he again had repeated to respondent his rights to counsel and respondent elected to proceed without one. The record is clear on this point and on the further proposition that respondent was not intimidated, threatened, abused, or coerced into making the statement nor

was any promise made to him in order to elicit it. Pertinent excerpts of his testimony are as follows:

Q. And right here in this recording, the one that, this transcript that your attorney and, I am sure, you have examined, in spite of knowing these things, you went on and talked to the officers and told them what happened; isn't that the case?

A. Yes, I did.

Q. All right. Did anyone promise you anything if you did that?

A. Not at the moment, no sir.

Q. Did anyone threaten you in any way; charge you they were going to hit you or you were going to be harmed or damaged or threatened in any way if you didn't do this?

A. No, sir.

Q. No one did that, so this was a free and voluntary act on your part to go ahead and make this statement to the officers?

A. No, it wasn't a voluntary act, no.

Q. Well, in what way was it involuntary Mr. Brooks?

A. Like I stated before, you, yourself, had told me that you had tried to get in touch with a Judge and that you come back and you said you hadn't got in touch with the Judge; and then you left again and said you were going to try to get a lawyer and so when it reached the point that neither one of them, lawyer or judge responded to your call, I just - - - just wanted to get it over with.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT WITHOUT

WRITTEN OPINION WHEN THE DISTRICT COURT, WITHOUT AN EVIDENTIARY HEARING, HAD REFUSED TO ACCEPT THE FINDINGS OF FACT OF THE STATE COURT WHICH WERE MADE AFTER A FULL HEARING AND FULLY SUPPORTED BY THE RECORD CONTRARY TO THE MANDATE OF THIS COURT IN *LA VALLEE v. DELLE ROSE* 410 U.S. 690 (1973).

Not only was respondent's complained of statement found to be voluntary by the trial court after a full and fair evidentiary hearing in which respondent admitted a full knowledge of all his rights including his right to have counsel with him during the questioning and had elected to proceed without one, but also the statement was admitted in evidence at the trial with a "no objection" indication on the part of trial counsel.

After the trial court had heard the testimony of a police officer and the assistant prosecutor who had taken respondent's statement and from respondent himself, and having before him the transcript of the objected to recording, the court evaluated this evidence in accordance with *Miranda* admonitions.

As indicated by defense counsel the statement itself showed the following:

Q. "Do you want an attorney, do you?"

A. "I would like to have one, but since there is —"

Q. "Since what?"

A. "Since you don't have one, it's all right."

The court then indicated that there was additional data not read by defense counsel and called counsel's attention to the next question.

Q. "Well, we can call one for you, but if you don't want one, we can take the statement. Now, do

you want to go ahead and talk to us without an attorney?"

A. "Yes, I will talk to you."

Q. "You don't want an attorney in the room with you at this time?"

A. "No." (66a)

The court then found:

"He (respondent) has been apprised or at least he was apprised of his constitutional rights at that time as *Miranda* has stated that he was entitled to an attorney; entitled to the attorney and he didn't have to say another thing, because he knew what the law was and he knew what his rights were. There is no evidence to the effect that he was promised anything for this statement, because from his own statement there wasn't anything said in relation to a promise until after this statement was given and I still don't know that that promise was, if anything, because we never completed that part of the questioning either from you or the State in cross-examination.

"Now, he knew and he amply demonstrated the fact that he knew what the law was at the time he made this statement. He has a perfect right of waiving his constitutional position according to the *statement that was offered as a joint exhibit by both parties.* (emphasis supplied)

"The Court can only come to one conclusion and that is, one, he was apprised of his constitutional rights; 2, that he waived those rights. *But, the Court would still allow you to hear from any other officer and would change its position in case there was any other evidence to the contrary. Until we start trial, you may reserve that right and the Court will also change his position in case he is wrong. Anything further.*" (emphasis supplied)

Mr. Thomas Lowrey: "No, not at this time."

The Court: "So, the Court is going to overrule your motion, Mr. Lowrey, the motion to suppress."

Nor was any attempt made by defense counsel to solicit further evidence prior to or during trial to convince the trial court that it was in error.

The district court, having had before it the complete record both pre-trial and trial, should have been able to determine that the findings of the trial court were supported thereby and should have accepted them.

This Court recently held that if the factual dispute on the merits, after a full hearing is resolved by the state trial court, it shall be presumed correct if supported by the record. See: *La Vallee v. Rose*, *supra*. To be sure *La Vallee* went to the voluntariness of a confession where we are here concerned with a waiver of counsel, but the result is the same. The only claim of involuntariness arose out of alleged *Miranda* violation. And the court below normally has followed this rationale, Cf: *Jenkins v. Kropp*, 424 F. 2d 665 (6th Cir., 1970).

The district court elected to review a cold record and assess thereto different values than did the trial court which had an opportunity to observe the witnesses. As Mr. Justice Jackson stated in his dissent in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) at page 171, "[A] few minutes observation in the courtroom is more informing than reams of cold record." See also, *Wright v. North Carolina*, 483 F. 2d 405,408 (4th Cir., 1973), *cert. denied*, U.S. , 14 Cr. L. 4188.

Moreover, the state appellate court had, in its ruling in the case, demonstrated its sensitivity to the *Miranda* question and its proper application by the trial court as follows:

> "The record reveals the proceedings in which the purported confession were made. *The court, in con-*

> *sideration of the motion to suppress had before it sufficient evidence to justify its conclusion that, although the interrogation and confession were made without the presence of counsel, the appellant had knowingly and intelligently waived his privileges against self-incrimination, and his right to retained or appointed counsel at the time.* The question before the court on the motion to suppress the evidence were questions of fact and law, and we do not find error of a prejudicial character in the court's ruling." (emphasis supplied)

Not only did the district court err in refusing to accept the finding of the trial court, it arrived at its decision in a clearly erroneous manner. It relied upon the decision of the court below in *Combs v. Wingo,* 465 F. 2d 96 (6th Cir., 1972) wherein, after the defendant had stated that he wanted to make a statement, but first wanted to talk to an attorney, the police persisted in quesioning him and finally overcame his will by showing him a ballistics report indicating that his rifle had fired the fatal bullet. He then made a confession without consulting an attorney. There was no such compulsion here.

Petitioner believes rather that the decision of the court below in *Hill v. Whealon,* 490 F. 2d 629 (6th Cir., 1974) should have governed this case. Petitioner further believes that the prosecution carried its burden of proving that respondent had knowingly and voluntarily waived his right to remain silent until an attorney was present.

The district court appears to have concluded that respondent's statement was involuntary as a matter of law in that once he had indicated a desire for counsel that thereafter, he could not be questioned under any circumstances. In *Hill* the court stated at page 635:

> "Hill contends that his confession was involuntary as a matter of law. He asserts that once he was ad-

> vised of his *Miranda* rights and declined to make a statement, the police were precluded at all times thereafter from asking him any questions or talking with him about the case in any way. We join other circuits in refusing to adopt such a narrow construction of *Miranda*."

See also: *United States v. Reynolds*, 496 F. 2d 158 (6th Cir., 1974); *United States v. Vaughan*, 496 F. 2d 622 (6th Cir., 1970).

Miranda, as interpreted by several other federal appellate courts has been held to provide that a defendant must be advised that, (a), he has the right to the presence of counsel and, (b), that the right was to have an attorney before he said a word. Once that he has indicated an understanding of these rights and then elects to give a statement no *Miranda* violation occurs.

In *United States v. Collins*, 462 F. 2d 792,802 (2nd Cir., 1972), the court sitting *en banc* stated:

> "(W)e agreed that what *Miranda* requires is that 'interrogation must cease' until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind."

In the majority opinion of the three judge panel at page 797 it was stated:

> "We do not believe that anything decided in *Miranda* was meant to prohibit police officers from ever asking a defendant to reconsider his refusal to answer questions. So to hold would be tantamount to enacting a "no questioning" rule once a suspect was in custody. Such a rule finds no support in the Fifth Amendment nor, fairly read in *Miranda* itself, nor in common sense."

In *Massimo v. United States*, 463 F. 2d 1171 (2nd Cir.,

1972), *cert. denied* 409 U.S. 1117, the court reasoned at page 1174:

> "The only conclusion Massimo would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning and since no lawyer could not be provided, he could not be questioned."

See also: *United States v. Scoggins*, 459 F. 2d 182 (8th Cir., 1972); *United States v. Montos*, 421 F. 2d 215, 224 (5th Cir., 1970), *cert. denied* 397 U.S. 1022; *Klinger v. United States*, 409 F. 2d 299, 308 (8th Cir., 1969), *cert. denied*, 396 U.S. 859.

Respondent has acknowledged throughout that he knew that he had a right to counsel and that one could and would be appointed for him. He knew that he did not have to answer any questions in the absence of counsel. Moreover, there is not a scintilla of evidence that any pressures of any kind were made to get him to talk in the absence of counsel.

In habeas corpus proceedings, a federal court must independently apply the constitutional standards to the historical facts upon which a petitioner predicates his claim even though the state court has fairly litigated his claim. But where the state court has applied the proper constitutional standards and the issue concerns only the historical facts as found and declared by the state court, which is the case here, Section 2254 (d), 28 U.S.C. provides that, in the absence of any of the circumstances specifically enumerated in *Townsend v. Sain*, 372 U.S. 293 (1963), the findings of the state court are presumed to be correct and the petitioner has the burden of establishing by convincing evidence that the evidentiary record of the state court does not "fairly support" the finding made by the state court. Here respondent not only

presented no evidence to prove the record faulty, he relied upon it. So did the district court.

In *Wright v. North Carolina, supra,* the court stated at page 408:

> "The statutory standard of 'fairly supported' has been held to the same as the 'clearly erroneous' standard employed in federal appellate review of trial findings on constitutional facts. *Leavitt v. Howard, supra* (462 F. 2d at 996); Note, Developments are in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, at 1133-4 (1970). The issue thus becomes whether the finding by state court that the petitioner's statement was voluntarily, knowingly and intelligently made was fairly supported by the records as determined by the clearly erroneous standards."

Petitioner can find nothing in the findings of the state court to suggest much less prove them to be clearly erroneous.

There is nothing in *Miranda* itself moreover that compels a conclusion that *Miranda* rights cannot be waived. In fact, the *Miranda* Court stated:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475.

At page 478 the court further stated that any statement "given freely and voluntarily without any compelling influence is, of course, admissible in evidence . . . .".

The District of Columbia Court of Appeals in its majority opinion in *United States v. Frazier,* 476 F. 2d 891 (D.C. Cir., 1973) stated at page 899:

> "Wise administration of the waiver of the *Miranda* rule is, of course, of central importance to the continued health of the rule itself, which was promulgated upon the explicit premise that it could be validly waived. When the police have, as here, faithfully followed the exact procedure prescribed by the Supreme Court, inferior courts should be slow to mandate, after the fact, enlarged responsibilities alien to the duties and the training of policemen."

Petitioner believes that a decision of a district court that would result in the release of a killer is untenable unless the respondent is able to show, by a preponderance of the evidence, that his statement indeed was involuntarily made. The state court record does not provide such proof.

2. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT WITHOUT WRITTEN OPINION WHEN THE DISTRICT COURT REFUSED TO CONSIDER THE QUESTION OF HARMLESS ERROR THE QUESTION HAVING BEEN RAISED BY PETITIONER BOTH IN THE DISTRICT COURT AND IN THE COURT OF APPEALS.

In the opening statement to the jury defense counsel told the jury that Obie Brooks would take the witness stand and tell them that he and Ossie McMillan set out to commit a robbery to procure funds. Ossie McMillan owned a gun which was in the front seat. They followed a man they intended to rob, but the man parked in a lot outside a bar and was lost to view. Brooks took the gun and proceeded into the parking lot in search of the intended victim. McMillan followed. When they were

unsuccessful in their objective, they decided to leave but before they did men ran from the bar and pursued them. They separated and Brooks half-turned and fired two shots in the direction of his pursuer. He claimed that they were fired toward the ground. Another pursuer was ordered to cease following and did under threat of being shot. (Brooks pointed the gun at him.)

Obie Brooks took the stand and testified in his own defense substantially as his counsel had stated he would. The witness did not identify Brooks, but Brooks himself testified as to the fact. Brooks' testimony and the opening statement of defense counsel was substantially the same as the complained of statement.

It is apparent that defense counsel was attempting to procure a verdict to a lesser included offense and was satisfied that the statement would corroborate Brooks' in-court testimony. The fact is that he succeeded in convincing the trial court that respondent was not guilty of first degree murder. A verdict of murder in the second degree was returned by the court.

Ossie McMillan, who also was under indictment for first degree murder, testified for the state and substantiated with variations, the testimony of Brooks. There was no difference however, as to the intent of both to commit an armed robbery and the general carrying out of the plan. Many state's witnesses testified as to facts corroborating the testimony of both witnesses.

Lastly, when the complained of tape was offered in evidence it was admitted without objection.

Petitioner believes that under the facts and circumstances of this case that the district court erred in refusing to consider petitioner's claim of harmless error under the criteria of *Chapman v. California*, 386 U.S. 18 (1962); *Harrington v. California*, 395 U.S. 250 (1969).

The district court proceeded under the theory that no Fifth Amendment violation can be harmless as follows:

> "The respondent contends that even if a constitutional violation occurred, there was no prejudicial error caused by the admission of the statement into evidence at the trial. The Court cannot accept this argument. As indicated in *Combs v. Wingo, supra*, the violation of the Fifth Amendment rights of the accused requires a reversal of the petitioner's conviction. The Court wholeheartedly agrees that where the cherished right against self-incrimination has been violated, it is impossible to determine what prejudicial affect the evidence coming from the accused's own mouth has on the trier of fact."

But this Court has held differently. Cf: *Milton v. Wainwright*, 407 U.S. 1 (1972); *Brown v. United States*, 411 U.S. 223 (1973).

CONCLUSION

Petitioner believes that the courts below misgauged completely the rationale of *Miranda* in holding that a request for counsel followed by a statement made without the benefit of counsel *per se* rendered the statement constitutionally impermissible. There is nothing in *Miranda* itself nor in the great weight of the decisions of the various courts of appeals including decisions of the appellate court below to sustain such a conclusion.

The cases, rather, support the doctrine that once a person has been advised of his rights, including the right not to be questioned without the benefit of counsel, and that he understands these rights, he then may waive them. The record in this case adequately demonstrates that respondent was advised of his right to counsel, including court appointed counsel, that he understood this

right fully and that he elected to proceed to make a statement when counsel was not available. The trial court so found and under the *Delle Rose* decision this finding is binding upon the district court. There being no other evidence to prove that the statement was not involuntarily made the district court's finding clearly was erroneous and was improperly affirmed by the court of appeals.

In any event under the facts of this case the admission of the taped statement into evidence, whatever its character, was harmless error beyond question.

Wherefore petitioner prays that this Court grant the writ of certiorari sought herein.

Respectfully submitted,
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APPENDIX
FOR THE SIXTH CIRCUIT

No. 74-1145 ORDER

OBIE BROOKS,
Petitioner-Appellee,

v.

E. P. PERINI, Supt.
Marion Correctional Institute,
Respondent-Appellant.

Before: CELEBREZZE and MILLER, Circuit Judges and GRAY,* District Judge.

Appellee was convicted of second degree murder in violation of Ohio Revised Code § 2901.05. His conviction was affirmed by the Court of Appeals of Summit County, Ohio, and the Ohio Supreme Court denied leave to appeal. The District Court granted his petition for habeas corpus for the reason that he was denied his Fifth Amendment right against self-incrimination

Having reviewed the briefs and the record, and upon hearing oral arguments, the Court is of the opinion that the judgment of the District Court should be affirmed.

Therefore, for the reasons expressed in the opinion of the District Court, it is ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN, Clerk

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* The Honorable Frank Gray, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

FOR THE SIXTH CIRCUIT

No. 74-1145 ORDER

OBIE BROOKS,

Appellee,

v.

E. P. PERINI, Supt.
Marion Correctional Institute,

Appellant.

Before: CELEBREZZE and MILLER, Circuit Judges and GRAY,* District Judge.

Appellant having filed a petition for rehearing en banc and no judge of the Court having requested a rehearing en banc, the motion has been referred to the panel which heard the original appeal.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN, Clerk

* The Honorable Frank Gray, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 73-218

OBIE BROOKS,

Petitioner,

v.

E. P. PERINI, Superintendent
Marion Correctional Institution,

Respondent.

OPINION

This cause came to be heard on a petition for a writ of habeas corpus. The petitioner is presently incarcerated in the Marion Correctional Institution, Marion, Ohio pursuant to a conviction under §2901.05, Ohio Revised Code, for second degree murder. The petitioner was tried before a three-judge panel of the Court of Common Pleas of Summit County, Ohio.

The petitioner appealed his conviction in the Court of Appeals of Summit County, Ohio, which affirmed the conviction following oral arguments. The petitioner subsequently filed a notice of appeal and memorandum in support of jurisdiction in the Supreme Court of Ohio. The Supreme Court of Ohio denied petitioner's request for leave to appeal from the judgment of the Summit County Court of Appeals.

The petitioner in his petition alleges five bases to support his petition for a writ of habeas corpus, (1) denial of a fair trial and due process of law when the trial

court admitted testimony of witnesses where the prosecutor had failed to provide defense counsel the prior statements of those witnesses until 3:30 P.M. the day before the trial was scheduled to commence although the trial judge had ordered the disclosure of all such statements; (2) denial of a fair trial and due process because the trial judge refused to grant a continuance for defense counsel to study the statements of the prosecution witnesses presented to the petitioner the day before the trial; (3) denial of a fair trial and due process because the prosecutor withheld certain statements and evidence which would tend to exculpate the petitioner; (4) denial of a fair trial and due process when the trial court admitted testimony concerning statements made by petitioner which contravenes *Miranda v. Arizona*, 384 U.S. 436 (1966); and (5) denial of due process of law by the Ohio Supreme Court when it referred oral arguments of petitioner's appeal to a master commissioner.

I.

Initially, the respondent contends that the petitioner has failed to exhaust his state remedies because the petitioner has not utilized the provisions of §2953.21 *et seq.*, Ohio Revised Code (Ohio's post-conviction relief act). The Court, however, finds that the petitioner has exhausted his available state court remedies required by 28 U.S.C. §2254 (b) and (c) as interpreted by *Fay v. Noia*, 372 U.S. 391 (1963). The petitioner has previously presented all the federal constitutional claims in his petition to the highest state appellate court as indicated by the Brief of Petitioner submitted to the Ohio Supreme Court (Exhibit III (V) to Respondent's Answer to the Show Cause Order of this Court). As indicated by *Picard v. Connors*, 404 U.S. 270 (1971), a state prisoner need

only have presented his constitutional claims to the highest state court to meet the exhaustion requirements of 28 U.S.C. §2254. This Court stated in *Howell v. Perini*, Civil No. 73-248 (N.D. Ohio, filed September 21, 1973) that when a state prisoner has once presented his federal constitutional claims to the highest court on an appeal of right, and the state courts have had an opportunity to pass on those claims, the petitioner need not pursue the additional procedures available under §2953.21 *et seq.*, Ohio Revised Code, before presenting to the federal courts his constitutional claims by means of a writ of habeas corpus.

II.

The Court passes only upon petitioner's claim regarding the alleged denial of a fair trial and due process of law when the trial court admitted a statement made by the petitioner which contravenes *Miranda v. Arizona, supra*, since the Court believes this issue requires the issuance of the writ. Accordingly, the other issues presented by the petitioner are not here considered.

The facts giving rise to this constitutional claim are sufficiently clear from the transcript of the hearing on the motion to suppress and the trial, so that no hearing is required in this Court. The petitioner received a full and fair evidenciary hearing in the state court presenting the relevant facts. *Townsend v. Sain*, 372 U.S. 293 (1963).

Petitioner's claim of a violation of his *Miranda* rights comes from the introduction into evidence at his trial of a transcript of a recorded statement that the petitioner gave to the authorities concerning the events of the shooting of one Robert J. Mann. The facts supporting this claim are not in dispute. It appears from the transcript

of the suppression hearing and the trial that the petitioner was taken into custody by Officers Everett Peasley and Robert Farmer of the Akron Police Department at approximately 10 or 10:30 A.M. on November 9, 1971, (Tr. Vol. I, 19, 42; Vol. II, 189, 303) who thereafter transported petitioner to the police station and placed him in an interrogation room (Tr. Vol. I, 19, 45; Vol. II, 190). The statement at issue was made after petitioner had been placed under arrest but prior to being "booked" on charges of first degree murder. (Tr. Vol. I, 25; Vol. II, 196). The petitioner was advised of his *Miranda* rights by the arresting officers prior to being interrogated concerning the shooting death of Robert J. Mann. (Tr. Vol. I, 19-20, 46, 54; Vol. II, 190-91, 304-05). There is a conflict in the testimony between the petitioner and the police officers as to whether the petitioner made an oral statement to the police officers prior to making the recorded statement concerning the same events as appears in the controverted statement. The petitioner stated that he made no oral statement to the officers prior to his recorded statement at issue. (Tr. Vol. I, 47; Vol. II, 304). Officer Peasley, on the other hand, testified at the trial that the defendant responded prior to the recorded interview to questions about the events of the shooting. (Tr. Vol. II, 192). This dispute is of little consequence as petitioner's claim goes to the introduction of the recorded statement. In any event, the arresting officers subsequent to some preliminary conversations with the petitioner summoned the Assistant County Prosecutor Charles Lowrey to conduct the recorded interrogation in question. (Tr. Vol. I, 36-37; Vol. II, 196). Prosecutor Lowrey proceeded to conduct the interview at which the two arresting officers were also present. (Tr. Vol. I, 30, 47, 55-56; Vol. II, 192-94). The County Prosecutor,

before beginning his interrogation, advised the petitioner of his constitutional rights as established in *Miranda*. (Tr. Vol. I, 31, 57, 59-60).

At this critical point, the parties to the interview have confused recollections about the events that transpired during the interrogation. Unfortunately, the transcript of the interrogation was not presented to this Court, so the Court has had to reconstruct the pertinent parts from the transcripts presented. The petitioner stated at the hearing and the trial that the prosecutor asked him to make a statement, and that he started on it and then stopped because he wanted a lawyer and communicated this desire to the prosecutor. Petitioner related that the prosecutor stated he would call the judge and try to arrange to get the petitioner a lawyer, and the prosecutor then immediately left the room for fifteen minutes. Upon returning, according to the petitioner, the prosecutor told the petitioner that he could not get in contact with the judge. The petitioner then testified that the prosecutor again began to question him and that he answered some of the prosecutor's questions but after about five or ten minutes the petitioner again requested the presence of a lawyer. The prosecutor, according to Brooks, once again left the room and upon his return told the petitioner that he had reached the judge but that he could not contact a lawyer. Petitioner then testified that after being informed by the prosecutor that he could not contact a lawyer, the prosecutor again read him the *Miranda* warnings. (Tr. Vol. I, 47-52; Vol. II, 305-06). At this point the transcript of the petitioner's examination at the suppression hearing is as follows:

Q. All right. I am interested in what happened when the prosecutor came back?

A. He told me that he had reached the Judge but that he couldn't reach the lawyer.

Q. And what did you say to that?

A. I don't remember the exact words.

Q. Did they start taking your statement at that time?

A. Yes, after he read me my rights again.

Q. He read them to you?

A. Yes.

Q. And what did you answer when you got down to the part where, "If you cannot afford to hire a lawyer, one will be appointed for you before any questioning and the State will pay them." And he asked you if you understood that and your answer was, "Yes."?

A. Yes.

Q. All right. And another question was, "Having all of these rights in mind. do you wish to talk without an attorney?" And you said, "Yes, I will talk to you." You also said, "I would like to have one, but since there is none, it's all right." Now why did you say that?

A. This is prior to that statement I made; that is when he said that he couldn't get a lawyer. And this was the purpose of the statement.

Q. What do you mean, the purpose of the statement?

A. I said it because they were trying to get me a lawyer. This is what I was told. And so, since they couldn't get a lawyer, this is the purpose of the statement. This is why I made the statement.

Q. But, you did want an attorney at that point?

A. I most certainly did. (Tr. Vol. I, 51-52).

Prosecutor Lowrey indicated the following at the suppression hearing:

Q. Do you recall a conversation to Mr. Brooks to the effect that he was entitled to an attorney to be

present with him prior to any interrogation actually taking place?

A. Well, of course, that admonishment is part of the Miranda Warning and either — I would never rely — even though I would be assured that policemen had conducted or, you know, administered the warning, I would never rely on it. I always administer or make a Miranda warning and the Miranda questions, I always do that myself.

Q. Well, was there — do you recall any conversation taking place outside the transcript of the recording that we have before us was — the basis of this?

A. Yes, I do.

Q. All right. The outside, the ancillary conversation, did that consist of any statements to the effect that a Judge would be called to secure an appointment of counsel for this defendant?

A. Well, I know that that is the way counsel is appointed by, you know, by calling to the Judge who is presiding on the Common Pleas Court at that time and, and I don't recall having such a conversation with Brooks, but I know it to my knowledge, so it may have happened, because my memory is not so total nor my recall so complete that I can tell you now, under oath, that I didn't say it. I know it's truth and I may have said it.

Q. Did you, in fact, make a call to any of the Common Pleas Judges of Summit County for the appointment of counsel for this defendant, Obie Brooks?

A. Mr. Lowrey, I have been thinking about this to myself ever since this morning, you know, when I became, during the interrogation of Officer Farmer, that this was what we are after and you and your co-counsel, Mr. Lynett are interested

in. I can't tell you it didn't happen; I don't think I did it. I don't recall doing it.

Q. Well, calling your attention to a question that was posed to Mr. Brooks at that time, November 9, 1971, during the interrogation and the transcript of the recording that was taken at that time, calling your attention to the bottom of page one of that transcript, the question is: "You don't want an attorney present at this time?" And the answer: "I would like to have one, but since there is none, it's all right."

A. I don't recall that exchange, but just as I told you this morning, on this record, I stipulate the accuracy. The question was posed and that answer posed by your client.

Q. Well, with that question and answer taking place at that time, would you consider that a request for an attorney had been made by this defendant?

A. Well, if I had to consider just that as theoretical theorem, I would have to say there was some interest made, but, this particular question, I am aware of this question. You have to consider the context of the former question and the question and answer posed afterward and the one posed after that. I did not, as I read that transcript, I did not feel there had been a request for counsel being immediately made available. Now, if you are — the way you posed the question, that question and that answer, would I say? And I have to say that in my mind if that is all I am considering, merely that question and that answer, I have to say there had been an interest had — in the evidence .(Tr. Vol. I, 31-33).

Officer Farmer testified at the suppression hearing:

Q. All right. Now, with regard to these statements of Mr. Lynett has made to the Court, did you have occasion at any time during the time that

Mr. Brooks was in the interrogation room to call a Judge of any Court?

A. I don't recall any — any conversation whatsoever in regard to a Judge.

Q. Well, did Mr. Brooks ever make known to you or to someone, other police officer in your presence, that he desired to speak to an attorney or desired to have an attorney appointed to represent him in this matter?

A. As my memory serves me right, he agreed to give the statement and during the giving of these rights he did state that he agreed to go ahead with the recording. Then he hesitated and said something about an attorney and then he agreed to go ahead. Then he was again asked if he was willing to — in other words, if he was willing to give this recording without the attorney and he again said, "yes."

Q. And, then, after that was he asked and did he give you information and did he give you a statement?

A. He did. (Tr. Vol. I, 21.)

Officer Peasley stated at the trial:

Q. Now you recall when you took the recorded statement of Mr. Brooks that you, after giving him the Miranda Rights, you asking if he wished to have an attorney?

A. Yes, sir.

Q. And do you recall his answer at that time? Referring specifically to the fourth question from the bottom on the first page of your recorded statement of transcript.

A. You mean, "Having these rights in mind, do you wish to talk to us without an attorney"?

Q. That's the correct question, yes.

A. His answer was, "Yes, I'll talk with you."

Q. Do you recall asking the next question?

A. Yes.

Q. And do you recall his answer?

A. "You don't want an attorney present at this time"? His answer was, "I would like to have one, but since there is none, it is all right."

Q. Did you consider that a request for an attorney?

A. No, sir. (Tr. Vol. II, 197).

The trial judge, at the suppression hearing, ruled that the statement made by the petitioner was admissible into evidence. The judge stated:

> THE COURT: . . . The only point that I, the Court has, if the Court would stop there, the Court would agree with you in relation to the statement, but the next question that follows is: "Well, we can call one for you," — follow me — do you follow that on the bottom of page one?
>
> MR. THOMAS LOWERY: Yes.
>
> THE COURT: "Comma — but if you don't want one, we can take the statement. Now, do you want to go ahead and talk to us without an attorney?" Answer: "Yes, I will talk to you," On the following page, question: "You don't want an attorney in the room with you at this time?" Answer: "No." He has been apprised or at least he was apprised of his constitutional rights at that time as Miranda has stated that he was entitled to an attorney; entitled to the attorney and he didn't have to say another thing, because he knew what the law was and he knew what his rights were. There is no evidence to the effect that he was promised anything for this statement, because from his own statement there wasn't anything said in relation to a promise until after this statement was given and I still don't know that that promise was, if anything, because we never completed that part of the questioning either from you or the State in cross-examination.
>
> Now, he knew and he amply demonstrated the fact

> that he knew what the law was at the time he made this statement. He has a perfect right and he and he alone has the perfect right of waiving his constitutional position according to the statement that was offered as a joint exhibit by both parties.
>
> The Court can only come to one conclusion and that is, one, he was apprised of his constitutional rights; 2, that he waived those rights. . . . (Tr. Vol. I, 64-65).

This Court disagrees with the trial judge at the suppression hearing and concludes the *Miranda* required the exclusion from evidence of the recorded statement made by petitioner. As indicated by the factual outline above, there is no substantial dispute from the record that the petitioner at the time he made the inculpatory statement was in custody of the Akron Police Department and also that his statement was the product of custodial interrogation. As such, the constitutional requirements of *Miranda* are applicable to this case.

In *Miranda v. Arizona, supra*, the Supreme Court concerned itself with the protection of the Fifth Amendment privilege against compelling an individual to incriminate himself as a result of in-custody interrogation. The Supreme Court concluded that the protection of that privilege required that the police observe certain procedures prior to and during custodial interrogation because of the inherent compulsiveness of police interrogation. The main procedure required by *Miranda* was a comprehensive warning to be given by the authorities prior to interrogation which advised an accused of his right to remain silent and his right to have the presence of counsel. To insure that the advisement as to the constitutional rights has some meaning, the Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning,

> that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. 384 U.S. at 473-74 (emphasis added, footnotes omitted).

The United States Court of Appeals for the Sixth Circuit has followed the plain language of *Miranda* set out about in *Combs v. Wingo*, 465 F. 2d 96 (6th Cir. 1972). In *Combs*, the petitioner who was sought on a murder charge surrendered to the authorities. He was informed of his constitutional rights under *Miranda* and then taken to state police station where his constitutional rights were again explained to him. The petitioner indicated he understood his rights and further stated he wanted to make a statement but wanted first to talk to an attorney. The police officers who had the petitioner in custody agreed but then immediately asked the petitioner to read something and proceeded to read to the petitioner a ballistics report on a rifle and a bullet. The police officer at the petitioner's state court trial testified that the petitioner, after the report was read to him, started to cry and put his head in his hands and then

made inculpatory statements regarding the crime. The Court of Appeals found that the statements made by the petitioner Combs after the police officer read the ballistics report was made involuntarily under Fifth Amendment standards as prescribed in *Miranda*. The Court of Appeals found that the portion of *Miranda* opinion set out above was dispositive of the case and conditionally granted the writ of habeas corpus.

Similar results have occurred when an accused, after receiving the requisite *Miranda* warnings, failed to waive the right to remain silent but the authorities nevertheless questioned the accused and obtained incriminating statements. *United States v. Ramos*, 448 F. 2d 398 (5th Cir. 1971). Also, another court held that the same portion of the *Miranda* opinion was a basis for finding a constitutional violation when police continued interrogating an accused after he had requested the aid of counsel and proceeded to procure a written consent to a search that produced incriminating evidence used in the trial. *United States v. Fisher*, 329 F. Supp. 630 (D. Minn. 1971). In *Fisher*, the court stated:

> "The very purpose of the *Miranda* warning are to permit a defendant to refuse further interrogation and to enable him to obtain legal advice as to his rights. The interrogating officers, in any case, when a defendant so expresses himself and lodges such request, should not continue interrogation nor seek further to procure consentual admissions from him, whether in the form of confessions, consent to search, *waiver of privilege* or otherwise." 329 F. Supp. at 634 (emphasis added).

The Court concludes that the above cited authorities clearly indicate that the actions of the police and county prosecutor in the case at hand violated petitioner's Fifth

Amendment right against self-incrimination as the recorded statement was involuntarily obtained under the standards originally established in *Miranda* and applied in *Combs v. Wingo, supra.* The record clearly shows that the petitioner requested the presence of an attorney, that he was not provided an attorney and that the interrogation continued after petitioner's request. The trial judge at the suppression hearing found that petitioner waived his right to counsel subsequent to his request by agreeing to continue with the questioning after being fully informed of his constitutional rights. The respondent advances the same argument in this action. If their conclusions are accepted the constitutional protection promised by *Miranda* would indeed be illusory. Merely by continuing to seek a waiver of rights after a request by an accused for the presence of an attorney would be a most effective method of circumventing the guarantees of *Miranda.* The Sixth Circuit Court of Appeals recognized this proposition by its holding in *Combs.*

The respondent attempts to distinguish *Combs* from the instant case by contending that the police asked no questions of the petitioner during the interval when the prosecutor sought to obtain a lawyer for the petitioner and thus the police did not "pressure" the petitioner into making the statement. The Court finds, however, that as the Supreme Court stated in *Miranda* the "pressure" exerted during interrogation comes from the very nature of incommunicado custodial interrogation of individuals in a police-dominated atmosphere. The "pressure" here came from the continued requests of the police and prosecutor that petitioner proceed with the statement without a lawyer. The requests took the form of continued advisement of *Miranda* rights, seeking a waiver of those rights by petitioner. The plain language of

Miranda and *Combs* prohibits this pressure after an accused has requested the presence of an attorney during interrogation. The two options of the interrogators available after an accused has expressed his desire to have an attorney are clear. They must either provide counsel for the accused or cease the interrogation. Respondents seek to add a third option; continued efforts to obtain a waiver of the *Miranda* rights. This Court does not find this third option consistent with the express provisions of the *Miranda* and *Combs* decisions. It would result in the substitution of compulsion through the authorities seeking a waiver of rights for the practices of intimidation condemned in *Miranda*. The Court therefore finds that the statement at issue was made involuntarily under Fifth Amendment standards.

The respondent contends that even if a constitutional violation occurred, there was no prejudicial error caused by the admission of the statement into evidence at the trial. The Court cannot accept this argument. As indicated in *Combs v. Wingo, supra,* the violation of the Fifth Amendment rights of the accused requires a reversal of the petitioners conviction. The Court wholeheartedly agrees that where the cherished right against self-incrimination has been violated, it is impossible to determine what prejudicial affect the evidence coming from the accused's own mouth has on the trier of fact. The Court concludes that a reversal of the state Court conviction is constitutionally compelled.

The Court, finding a violation of petitioner's constitutional rights occurred in the state court conviction, will issue the writ unless appellant is retried by the State of Ohio and Summit County within a reasonable time without the introduction of any evidence of the unconstitutionally obtained confession or any evidence ob-

tained therefrom. *Combs v. Wingo, supra*; see also *Mitchell v. Salisbury*, 443 F. 2d 324 (6th Cir. 1971).

An order will be entered in accordance with this opinion.

(s) Don J. Young
United States District Judge

Toledo, Ohio